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No. 89-1869

In the Supreme Court of the United States

OCTOBER TERM, 1990

INDEPENDENCE BLUE CROSS, PENNSYLVANIA BLUE SHIELD, and DAVID S. MARKSON,
Petitioners

v.

U.S. HEALTHCARE, INC., UNITED STATES HEALTH CARE SYSTEMS OF PENNSYLVANIA, INC., and HEALTH MAINTENANCE ORGANIZATION OF NEW JERSEY, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The court of appeals in this case acknowledged that it faced a difficult question of first impression. It also recognized that the case involved two distinct lines of First Amendment case law, one involving defamation and the public figure doctrine, the other involving commercial speech. Pet. App. 26a. Rather than reconciling the two lines of authority, the court below rejected the traditional defamation analysis entirely, and created a *per se* exception to the public figure doctrine for commercial advertising.

Curiously, respondents' brief fails even to acknowledge the competing precedent; it makes virtually no mention

of the public figure doctrine, or the cases from this Court that have applied the doctrine. Respondents apparently believe that the label "commercial speech" is sufficient to resolve the matter, even though none of the cases they cite involve a claim for defamation. Respondents also simply deny that the court of appeals has rejected the holdings of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and related cases, even though the court itself admitted this fact. *See* Pet. App. 26a-27a; *id.* at 33a ("traditional defamation analysis would have us consider the public or private nature of the speech . . . . We believe, however, that the novel facts here require a different approach").[1] In short, while respondents do not take issue with the question presented by petitioners, none of their arguments respond directly to that question.

In failing to address this Court's defamation precedents, respondents leave unchallenged the critical points that make this case worthy of further review:

- Respondents do not deny that the advertisements in question address a matter of public concern;
- Respondents do not deny that where speech addresses a matter of public concern, traditional First Amendment analysis requires a defamation plaintiff to prove actual malice if that plaintiff is a public figure. Respondents do not dispute that the corporate parties in this action have all the traditional attributes of limited purpose public figures.

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[1] Similarly, respondents argue that "the court of appeals did not . . . conclude that existing First Amendment doctrine is 'unsuited to this kind of case'" (Br. in Opp. 1). This statement cannot be taken seriously, given the court of appeals' explicit recognition that "in this case, however, *traditional defamation analysis is not well suited to strike the proper balance* between the state and federal interests and First Amendment values in the context of commercial speech." Pet. App. 45a (emphasis added).

- Thus, respondents do not challenge the view that had the court of appeals followed this Court's defamation rulings, as set forth in *Gertz* and its progeny, respondents would have been required to satisfy the actual malice standard.

- Finally, respondents do not seriously dispute that the court of appeals has announced a broad rule, rejecting the public figure test for all commercial advertising cases. Indeed, respondents interpret the opinion below as establishing a *per se* exception to the doctrine. *See* Br. in Opp. 9-10 n.1 (suggesting that a corporation cannot achieve public figure status through advertising).

Rather than confront the question presented, respondents simply ignore the defamation line of cases, and focus exclusively on commercial speech cases. For the most part, U.S. Healthcare's brief merely repeats the court of appeals' rationale, and therefore suffers the same weaknesses as those identified in the petition.[2] To the extent

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[2] For example, respondents adopt the court of appeals' conclusions (a) that commercial speech *generally* needs less protection because it is less likely to be "chilled," and (b) that granting greater protection to commercial speech will somehow "dilute" the protection given to political speech. Br. in Opp. 7-8. Interestingly, respondents do not address petitioners' argument on the first point; as noted in the petition, while advertising *generally* might not be chilled, companies will be (and indeed, already have been) chilled from providing any meaningful, comparative information in their advertisements. Instead, they will switch to the kind of uncontroversial advertisements that add nothing to the free flow of ideas. *See* Pet. 22.

Respondents' "dilution" argument is also untenable in this context. As Judge Kozinski and his co-author have written in their discussion of commercial and non-commercial speech:

> It is urged that protecting the two forms of speech identically will cause some sort of leveling process, which will inevitably drain some protection from noncommercial speech. It is difficult to understand why this should be so. The argument seems to assume that the total amount of first amendment protection available for judges to draw upon is constant, so that protecting

respondents' arguments go beyond the opinion below, they do nothing to undermine the need for review by this Court:

1. Respondents argue that this Court already has determined that even commercial speech that addresses a matter of public importance should receive less constitutional protection than non-commercial speech. *See* Br. in Opp. 10-11 (citing *Board of Trustees v. Fox*, 109 S. Ct. 3028 (1989); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980)). These cases, however, have little relevance to the question before the Court. Each of these cases (indeed, *all* of the decisions relied on by respondents) involved government regulation of speech. None of these decisions confronted a countervailing line of authority—such as the public figure doctrine—whose specific purpose is to protect speech on matters of public concern. The First Amendment interests that are protected by this Court's defamation cases simply were not present in the decisions cited by U.S. Healthcare.

2. Respondents make the related claim that if actual malice protection were available in this case, "too many" advertisements would receive this protection. *See* Br. in Opp. 11-12. As explained in the petition, however, most commercial advertisements cannot be construed as addressing matters of public concern. *See* Pet. 16. Even fewer discuss products such as the ones in this case, which are themselves at the heart of a public debate.[3]

> speech in one place will leave less protection for speech in another place where we might really need it.

Kozinski & Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 648 (1990) (footnote omitted).

[3] Respondents dispute this point by claiming, *inter alia*, that "tobacco, alcohol, drugs and automobile safety are 'themselves'

Respondents also attempt to justify the lower court's result with the untenable statement that "[p]etitioners clearly are able to comment directly about health care issues *without* simultaneously promoting their products, if they choose to do so." Br. in Opp. 12 n.3 (citation omitted, emphasis in original). It is far from clear how petitioners could publicly discuss the merits of Preferred Provider Organizations, or what they perceive to be the weaknesses of HMOs, without being accused (perhaps legitimately) of engaging in the promotion of their own product.[4] Thus, in this kind of case it simply is not true, under the court of appeals' decision, that petitioners "enjoy the full panoply of First Amendment protections for their direct comments on public issues." *See id.* at 12 (citing *Central Hudson*, 447 U.S. at 562 n.5).

The very examples that respondents cite in support of the decision below highlight the flaws of the lower court's opinion. Speech that is directed at a public figure and that discusses the health effects of cigarettes or drugs, or the environmental impact of products, unquestionably would be given full constitutional protection in a defamation action that did not involve commercial speech; the only distinguishing feature here is that the speakers had an overtly economic motive for making their statements. Respondents offer no support for the view that motive is a proper consideration in a defamation action, and they do not even attempt to justify the court of ap-

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matters of public concern . . . ." Br. in Opp. 12. This argument is far too broad; it seems likely that the vast majority of tobacco and alcohol advertisements, for example, only involve image enhancement and appeals to brand loyalty. Although the health risks associated with tobacco and alcohol products are a matter of public concern, "image" advertisements do not raise important public interests.

[4] Simply discussing HMOs generally, without referring to any particular HMO, is apparently insufficient to avoid the label of commercial speech. None of petitioners' advertisements in this case mentioned U.S. Healthcare by name.

peals' disregard of this Court's frequent admonitions against reliance on the speaker's motive in First Amendment cases. *See, e.g., Harte-Hanks Communications v. Connaughton*, 109 S. Ct. 2678, 2685 (1989). *See also* Pet. 15-16 (citing cases).

3. The petition observes that the opinion below is inconsistent with *Bigelow v. Virginia*, 421 U.S. 809 (1975), in which the Court ruled that commercial speech on issues of public concern should receive greater protection than other kinds of advertising. *See* Pet. 19-21. U.S. Healthcare responds that *Bigelow* is inapplicable, because in its view that case has been limited to "advertisements involving constitutionally protected activities such as abortions." Br. in Opp. 11 (citing *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328, 345-46 (1986)). Respondents then argue that because "the marketing of health insurance is clearly not a 'right' protected by the Constitution," *Bigelow* does not apply. Br. in Opp. 11.

This argument is based on a faulty premise. In *Posadas*, the Court simply concluded that because the legislature had the power to prohibit the *activity* that was being advertised (gambling), it also enjoyed the lesser power to prohibit the advertising of that activity. The Court distinguished *Bigelow* by noting that in that case, the underlying activity—abortion—could not be prohibited, and thus the advertising itself was constitutionally protected. *Posadas*, 478 U.S. at 345-46. No one, not even respondents, has suggested that the state in this case could prohibit the sale of all health care insurance. Respondents' reliance on *Posadas* as a basis for limiting or circumventing *Bigelow* is therefore misplaced.

4. Finally, respondents argue that the failure to create an exception to the public figure doctrine would be contrary to "the public interest." They complain that the actual malice standard makes it extremely difficult to punish offending speech, and that heightened constitu-

tional protection would be inconsistent with the Lanham Act. *See* Br. in Opp. at 12-13.

These arguments, of course, only address the merits of the court of appeals' decision, not whether the case presents a question worthy of review. And, in any event, the allegations of harm to the public interest are unjustified. It is true that the actual malice standard makes it more difficult to punish speech, but this is an *intended* effect, which itself serves the public interest by encouraging the dissemination of speech, and by encouraging public figures to respond to allegedly false speech with counter-speech, rather than litigation. Petitioners seriously doubt, and this Court has never held, that the "public interest" is best served by a rule that inhibits speech on matters of public concern.

Finally, even assuming for the sake of argument that the public figure doctrine imposes some limitation on the operation of the Lanham Act, this increases, rather than decreases, the need to grant the petition. The relationship between the First Amendment and an important federal statute is one that should be examined and defined by this Court.

Regardless of whether U.S. Healthcare's claims are under the Lanham Act or state tort law, the issue before this Court is the same. The case squarely presents the issue of the proper relationship between two developed First Amendment doctrines, the *Gertz* public figure doctrine and the commercial speech doctrine. This Court has never considered how these doctrines interact. This case provides a compelling opportunity to address that important issue.[5]

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[5] Respondents do not suggest that the procedural posture of this case poses an obstacle to immediate review. Nor could they, since this Court frequently has granted review in cases where the federal courts of appeals have remanded for further proceedings on the merits. Where the question presented has otherwise warranted this Court's attention, the Court has not hesitated to grant review even

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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in the face of such a remand. *See, e.g., Argentine Republic v. Amerada Hess Shipping Co.*, 488 U.S. 428 (1989); *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Tower v. Glover*, 467 U.S. 914 (1984); *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978); *Paul v. Davis*, 424 U.S. 693 (1976).